FILE COPY

Office - Supreme Court, U.
FILED
AUG 6 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

Docket No. 300

RIECE COZART, *et al.*,
Appellants,

against

CHARLES E. WILSON, Secretary of Defense, *et al.*,
Appellees.

Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia.

FRANK SCOLINOS,
Palace Building,
Tokyo, Japan.

MURRAY SPRUNG,
Hotel Tokyo Building,
Tokyo, Japan,
Attorneys for Petitioners.

EMANUEL REDFIELD,
Counsel for Petitioners,
60 Wall Street,
New York, N. Y.

THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-0978—1956

Index.

	Page
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia	1
Opinions Below	1
Matters Related to Jurisdiction	2
Question Presented	2
Treaties, etc., Involved	3
Statement of the Case	4
The Importance and Substantiality of This Case	6
Argument in Support of Petition	7
Appendix A—Opinion, Court of Appeals	19

TABLE OF CASES:

Page

Ahrens v. Clark, 335 U. S. 188 ..... 5, 7, 15
Asakura v. City of Seattle, 265 U. S. 332, 341 12

Burns v. Wilson, 346 U. S. 137 15

Coleman v. Tennessee, 97 U. S. 509 ..... 6, 7, 8
Cordova v. Grant, 248 U. S. 413 12

Dow v. Johnson, 100 U. S. 158 ..... 6, 7, 8

Eisentrager v. Forrestal, 84 U. S. App. D. C. 396 15
Ex Parte Quirin, 317 U. S. 1 16

Geofroy v. Riggs, 133 U. S. 258 at 267 11
Gibson v. United States, 329 U. S. 338, 359 17

Hamilton v. Kentucky Distillers Co., 251 U. S. 146, 156 12
Hawk v. Olson, 326 U. S. 271, 273 16

In re Cooper, 143 U. S. 472 at 503 12

Kiasella v. Krueger, 100 Law Ed. 807 at 813 .... 5, 6, 7, 8

Rubenstein v. Wilson, 94 U. S. App. D. C. 152 15

Schooner Exchange, 7 Cranch 116 ..... 6, 7, 8

Tarble's Case, 80 U. S. 397 16
The Cheroke Tobacco Case, 11 Wall. 616, 620 12
Toth v. Quarles, 100 Lawyer's Ed. 4 15
Tucker v. Alexandroff, 183 U. S. 424 ..... 7, 14

United States v. Charles F. Burney No. 7750 8
United States v. Provoo, 17 F. R. D. 183, 198, 203, aff'd 350 U. S. 857 13

Wade v. Hunter, 336 U. S. 684, 690 12
Walker v. Johnston, 312 U. S. 275 16
Williams v. Kaiser, 323 U. S. 471, 473 16

MISCELLANEOUS:

	Page
Security Treaty (T. I. A. S. 2491)	3, 10
Administrative Agreement (T. I. A. S. 2492)	3
"Status of Forces Agreement," Feb. 19, 1954	6, 9
53 Col. Law Rev. 1091	9
NATO Agreement	3, 9, 11
"Jurisdiction Over Friendly Foreign Armed Forces," 36 American Journal International Law 539, 40 American Journal International Law 257	9
99 Congressional Record 4818, May 7, 1953	10
Tucker, Limitation on Treaty Making Powers, Chap. 8	12
Willoughby, The Constitution (Second Edition), Chap. XXXVI, Sections 309 and 314	12
Burdick, The American Constitution, Section 34	12
Fifth Amendment to Constitution	12
Section 2 of Article IV of Constitution	12
Article I, Section 9	12
Article II, Section 2	12
Amendment IV	12
Amendment VI	12
Amendment VIII	12
Military Code, Sec. 602	12
Military Code, Sec. 618	12
Military Code, Sec. 619	12
Military Code, Sec. 646	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

Docket No. .

RIECE COZART, *et al.*, Appellants, against	)
CHARLES E. WILSON, Secretary of Defense, *et al.*, Appellees.	)

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Your petitioners, Riece Cozart, Gerald Germait and Mack Makarenko, by Emanuel Redfield, their attorney pray, that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia.

The petitioners commenced a proceeding for the issuance of a writ of habeas corpus by the District Court for the District of Columbia. That court, instead of issuing the writ in the first instance, signed an order to show cause why the writ should not be issued. After answer and after a hearing of the application the petition was dismissed on the merits and the rule to show cause was discharged.

Opinions Below.

The Court of Appeals wrote an opinion which is contained in Appendix A. The District Court's rendered oral

opinion is found on page 54 (which incorporates the opinion on p. 55) of the "Joint Appendix."

Matters Related to Jurisdiction.

(i) The date of the judgment of the Court of Appeals is July 12, 1956, and the time of its entry is July 12, 1956.

(ii) Jurisdiction is conferred on this Court by 28 U. S. C. 1254(1).

(iii) Jurisdiction in the first instance was conferred on the District Court by the Habeas Corpus Act, 28 U. S. Codes, Sects. 2241, 2253, and by Article I, Sect. 9, of the Constitution of the United States.

Questions Presented.

This appeal presents questions:

First, whether under the rules of international law the troops of an occupying country are immune from the jurisdiction of the occupied country for off-duty offenses committed in the occupied country.

Second, whether the "Status of Forces Agreement" dated February 19, 1954, between the United States and Japan is valid.

Third, whether the appellants, members of the armed forces of the United States, may be deprived by a treaty or administrative agreement of their right to the protections afforded by the Constitution of the United States and by the Military Code of the United States.

Fourth, whether the petitioners Germait and Makarenko may be detained by respondents for further trial in the Japanese courts under Japanese law, even though it has been demonstrated that their prosecution to date has

been attended with violations of their protections under the Constitution of the United States and Military Code.

Treaties, etc., Involved.

Security Treaty Between the United States and Japan signed September 8, 1951 (T. I. A. S. 2491). Article III thereof reads:

"The conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments."

Administrative Agreement between the United States and Japan dated February 28, 1952 (T. I. A. S. 2492). Section XVII thereof provides in part:

"2. Pending the coming into force with respect to the United States of the North Atlantic Treaty Agreement referred to in paragraph 1, the United States service courts and authorities shall have the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, the civilian component, and their dependents, excluding their dependents who have only Japanese nationality. Such jurisdiction may in any case be waived by the United States."

An amendment to Article XVII of the Administrative Agreement is found in a "Protocol" entered into between the Executive and Japan dated September 9, 1953, the pertinent text being as follows:

"2. (b) The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its law but not by the law of the United States."

Statement of the Case.

The petitioners Germait and Makarenko are enlisted Marines who are stationed in Japan. Germait enlisted on November 28, 1953, for two years. His enlistment expired on November 27, 1955. Makarenko enlisted on January 9, 1952, for three years. His enlistment expired on January 8, 1955 (App. 8, 9).

Both of them were indicted by the Japanese government on October 5, 1954, for the crime of rape under Japanese law. They were imprisoned on September 13, 1954, without pay throughout their trial which lasted until October 29, 1955, a period of about fourteen months (Joint Appendix 26).

They were convicted and received suspended sentences of two years and three years respectively.

Thereupon, the Japanese prosecutor entered an appeal which under Japanese law, like civil law, a retrial in which new evidence may be introduced and a new sentence may be imposed. For the purposes of this "retrial" they are being held by the respondents in Japan although their term of enlistment has long expired (J. A. 27).

The petitioner Cozart is an enlisted member of the Army, stationed in Japan. On January 9, 1955, he was indicted under Japanese law for what amounts to culpable negligence, in that he so recklessly drove a private auto vehicle that death ensued to a Japanese on the street. He is being detained by the respondents for the purpose of being turned over to the Japanese for trial.

Petitioners object to being tried under Japanese law, and hence this proceeding by way of an application for a writ of habeas corpus was instituted (J. A. 19).

An order to show cause why the writ should not be issued was granted on February 8, 1956, in the District Court for the District of Columbia (J. A. 3).

A return and answer was filed by the respondents in which three objections were made to the application (J. A. 14).

1. The District Court had no jurisdiction under the doctrine of *Ahrens v. Clark*, 335 U. S. 188, because the petitioners were outside the territorial limits of the United States.

2. The petitioners were not as a matter of fact detained.

3. The Administrative Agreement between the United States and Japan which provides for prosecution under Japanese law of the armed forces of the United States stationed there is valid.

A hearing on the application was held on March 9, 1956, before District Judge Joseph C. McGarraghy. He denied the application and discharged the rule on the merits. He held that the Administrative Agreement is valid and binding. He overruled the contention of the respondents that the District Court had no jurisdiction. Since petitioners alleged and showed a detention prima facie, by their affidavits, there was at least a question of fact that had to be resolved in accordance with the decisions of this court.

The Court of Appeals on July 12, 1956, affirmed the order of dismissal. It held in favor of respondents on the merits and supported its decision on language found in the recent *Kinsella v. Krueger* case decided by this court, June 11, 1956. It is part of petitioners' argument that the language in that case was purely dicta and unnecessary and does not represent the law pertinent to the facts in this case.

As to the jurisdictional question raised by the respondents, the Court of Appeals ruled in favor of petitioners, with these words:

> "We agree with the District Court that it had jurisdiction of the petition for habeas corpus. We decided in *Eisentrager v. Forrestal*, 84 U. S. App. D. C. 396, 174 F. 2d 961 (1949), that persons held by the United States Army in Germany could maintain habeas corpus proceedings in the District of Columbia. In that respect the *Eisentrager* case has not been overruled. The Supreme Court reversed our judgment, but on other grounds. *Johnson v. Eisentrager*, 339 U. S. 763 (1950). We afterwards assumed the presence of jurisdiction, in accordance with the *Eisentrager* principle, in *Rubenstein v. Wilson*, 94 U. S. App. D. C. 152, 212 F. 2d 631 (1954). Since the petitioners are not at liberty to leave Japan, or to move about freely within Japan, they are sufficiently restrained for the purposes of habeas corpus. *Lynch v. Hershey*, 93 U. S. App. D. C. 177, 208 F. 2d 523, is not to the contrary. That case involved a selective service registrant who had been ordered to report for induction but was not, as the present petitioners are, under actual military control."

The Importance and Substantiality of This Case.

This case is ripe for decision, because on its substantive side alone, it presents a serious question that has never been decided and is of a recurrent nature. The first question is whether, as the Court of Appeals said, the language in the *Kinsella* case, which is not at all apposite, has overruled the language in the *Schooner Exchange*, 7 Cranch 116, and the cases of *Coleman v. Tennessee*, 97 U. S. 509, and *Dow v. Johnson*, 100 U. S. 158, which are exactly in point. Subsidiary serious questions, never before decided, are whether the "Status of Forces Agreement" dated February 19, 1954, between the United

States and Japan is valid and even if valid, may such agreement operate to deprive a citizen of his rights under the Constitution and laws of the United States, especially, when it is demonstrated that the operation of such Administrative Agreement has in this case actually deprived these petitioners of their rights under the Constitution and laws of the United States.

Since the respondents in the courts below have urged a dismissal for lack of jurisdiction it may be that they will again do so here, and in that case, there would be squarely presented a further question of jurisdiction that was reserved by this court in *Ahrens v. Clark*, 335 U. S. 188, page 192, note 4.

Argument in Support of Petition.

Aside from the importance and novelty of the questions presented, the following argument supports the substantiality of the petition.

1.

Troops entering or occupying a foreign country are immune from prosecution in foreign courts for offenses committed there and if such immunity has not been waived by a valid Treaty, then no power lies in respondents to "extradite" petitioners for trial by the foreign power. *The Schooner Exchange*, 7 Cranch 116, which was followed and squarely applied in *Coleman v. Tennessee*, 97 U. S. 509, *Dow v. Johnson*, 100 U. S. 158, *Tucker v. Alexandroff*, 183 U. S. 424. Counsel has observed words in the *Kinsella* case, 100 Law Ed. 807 at 813 (and relied on by the Court of Appeals as having overruled *Schooner Exchange*), that the opposite is the rule of international law. There, the *Schooner Exchange* was cited for the

very opposite. It is submitted that this was an inadvertence, because a reading of that case plus the *Dow*, *Coleman* and *Tucker* cases indicates that the rule is that which petitioners state. Indeed, the Court of Appeals read the *Schooner Exchange* with the same meaning as petitioners, but decided that this Court overruled the *Schooner Exchange*. It is difficult to conceive how the rule in the *Schooner Exchange*, which was subsequently firmly embedded by the *Dow*, *Coleman* and *Tucker* cases, could have been overruled by the *Kinsella* case. What was said in *Kinsella* was dicta and unnecessary to the decision in the case and it is inconceivable that dicta would overrule established doctrine. In *Kinsella*, this Court held that a civilian who accompanied the armed forces was subject to the Military Code. This conclusion would have followed from the reasoning of the opinion wholly aside from the allusion to *The Schooner Exchange*.

Furthermore, petitioners' case is more analogous to *Kinsella*, in that petitioners assert that they should be tried under the Military Code instead of being "extradited" to Japan. This is in keeping with words found in *Kinsella* (p. 813):

> "Under these circumstances, Congress may well have determined that trial before an American court-martial in which *fundamentals of due process are assured was preferable to leaving American servicemen and their dependents throughout the world subject to widely varying standards of justice unfamiliar to our people.*"

See also the same thoughts expressed in the recent opinion of the court and in the separate opinion of Chief Justice Quinn of the United States Court of Military Appeals in *United States v. Charles F. Burney* No. 7750, decided March 30, 1956.

Perhaps an undue reliance was placed on Schwartz's monograph in 53 Col. Law Rev. 1091 to reach a conclusion that the rule of international law permitted a foreign occupied country to prosecute occupying troops for off-duty offenses. If a monograph to the contrary need be submitted, then reference is made to the ones of Colonel Archibald King, "Jurisdiction Over Friendly Foreign Armed Forces" in 36 American Journal International Law 539; 40 American Journal International Law 257. Colonel King's studies arrive at the very opposite conclusion to that of Schwartz.

Even Schwartz admits (p. 1093) that when the NATO Agreement (which does not govern this case) was ratified by the Senate it was done with a proviso by the Senate that the jurisdiction that was conferred by that Agreement was *not to be a precedent* for future agreements. This proviso is a Senatorial pronouncement by inference therefore, that jurisdiction has been in the United States, and that only in the case of NATO was the Senate willing to relinquish jurisdiction (which was not the case with respect to Japan). Indeed, the inference from Senatorial action with respect to NATO is even clearer. The Senate *conferred* jurisdiction over off-duty offenses to the visited country (Japan it should be remembered is an *occupied* country). Had jurisdiction existed in the foreign country there would have been no need to confer jurisdiction—even begrudgingly as it was done. This is a legislative admission by the Senate of the rule of international law. Since the Senate has broad powers under the Constitution with respect to foreign affairs, its admission must be given respect, if not authority.

So too is the admission by the Executive in this case with respect to the "Status of Forces Agreement." If the rule of international law were other than what petitioners assert, why would it have been necessary for the Executive to agree with Japan that Japan should

have jurisdiction to prosecute American trooops for off-duty offenses committed there?

See also, 99 Congressional Record 4818, May 7, 1953.

2.

No paramount authority has set aside the existing immunity from prosecution by the foreign occupied country. The respondents have contended that the immunity was waived by an agreement entered into between the President and Japan February 28, 1952. The authority for this administrative agreement, it has been urged, is derived from Article III of the Security Treaty Between Japan and the United States on September 8, 1951. Article III reads as follows:

"The conditions which shall govern the disposition of the Armed Forces of the United States in and about Japan shall be determined by Administrative Agreements between the two countries."

It will be seen that this Article speaks only of the "disposition" of the forces. The word "disposition" in any dictionary or military use has no reference to the status of military personnel before the courts. Disposition means the placing and geographical arrangement of the forces.

Indeed, the definition of "disposition" is found in Webster's New Collegiate Dictionary to be "The ordering or arranging of anything or the state of being arranged, especially systematically; as, the disposition of draperies; the *disposition of troops.*"

Had the drafters of that treaty intended to refer to the legal status of forces, they could have said so by plainly using the word "status" or by plainly referring to the waiver of immunity. Immunity should not be lightly

tossed aside without clear and special language showing such an intent. In a case like the present, one where the petitioners claim that their constitutional rights as American citizens have been bargained away without their consent or by a treaty ratified by the Senate, and that they are being deprived of their privileges and immunities as citizens, it is imperative that no force be given to language that is obscure and bears no relation to the subject matter.

The best proof of this is to be found in the language used in the NATO Agreement that was ratified by the Senate (the Senate did not ratify the Japanese Agreement) and upon which appellees rely. In the NATO Agreement it was expressly provided in the simple language required, that jurisdiction to try offenses was conferred on the visited country.

3.

(a)

Even if the administrative agreement had been authorized, it is not valid if it vitiates the constitutional rights of petitioners. Nor can it be valid if it operates to defeat the constitutional rights of petitioners.

Even treaties cannot destroy what the Constitution has guaranteed. In *Geofroy v. Riggs*, 133 U. S. 258 at 267, it was said:

> "The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize *what the Constitution forbids*, or a change in the

character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent." (Italics supplied.)

See also to the same effect, *The Cheroke Tobacco* Case, 11 Wall. 616, 620; *Asakura v. City of Seattle*, 265 U. S. 332, 341; *Hamilton v. Kentucky Distillers Co.*, 251 U. S. 146, 156; *Wade v. Hunter*, 336 U. S. 684, 690; *In re Cooper*, 143 U. S. 472 at 503; *Cordova v. Grant*, 248 U. S. 413; Tucker, Limitations on the Treaty Making Powers, Chapter 8; Willoughby, The Constitution (Second Edition), Chapter XXXVI, Sections 309 and 314.

For instance, a treaty could not abolish habeas corpus or impose a bill of attainder. Burdick, The American Constitution, Section 34.

It must be remembered that the petitioners are not free agents. They have not gone to Japan of their own free will. They have been *forced* by reason of their military status to enter a foreign jurisdiction. They themselves have not waived the rights they would have by trial in accordance with the Constitution and the Military Code.

These rights guaranteed by the Fifth Amendment, and by Section 2 of Article IV of the Constitution. Others are (this is not intended as an all-inclusive catalog): Article I, Section 9; Article II, Section 2; Amendment IV; Amendment VI; Amendment VIII; Military Code, Section 602; Military Code, Section 618; Military Code, Section 619; Military Code, Section 646.

These are some of the rights, privileges and immunities that are accorded to citizens of the United States. What the Japanese law is cannot be presumed. In fact, how the Japanese law compares with that of the United States is not relevant. The point is that these are the constitutionally protected rights of Americans. They have been bargained away without the consent of American

troops. Since the military personnel had no choice concerning their entry into or appearance in the foreign jurisdiction, it cannot be urged that the petitioners voluntarily submitted themselves to Japanese jurisdiction and laws.

(b)

Actually, the administrative arrangement has operated to defeat the rights of petitioners Germait and Makarenko. Two rights are indigenous to our system of the administration of justice. First, is the right to a speedy trial (*United States v. Provoo*, 17 F. R. D. 183, 198, 203, affirmed, 350 U. S. 857).

In this case the petitioners Germait and Makarenko were kept in the navy jail for fourteen (14) months on behalf of the Japanese. In fact, criticism of this was made (on last page) in the "Report of the United States Representatives" annexed to Exhibit C of "Return and Answer" for trial of these petitioners. It was there said, "As regards the rights of the accused, it is noted that the accused were not given a speedy trial, and that the court judged that Germait would pay 1,000 yen to a lawyer, Mr. Kimura, who was appointed by the court as defense counsel before Germait retained his own counsel. The indictment was served on 5 October 1954. Defense counsel for Makarenko was Mr. Koi Fukada of Otsu and Mr. John Gentillela of Kobe was retained by Germait; both are members of the Bar. The accused were held at Camp Otsu from their arrest until 18 September, 1954, when they were transferred to Camp Fisher Brig, where both men claim they were recipients of maltreatment until they signed a statement for the procurator's office. On 6 April 1955 they were transferred to Camp Okube Stockade, on 1 July to the Post Brig Camp Gifu, and on 25 August 1955 to the Marine Brig Camp McGill, where they remained confined awaiting the expiration of the appeal period. From 1 July 1955 they were detained

overnight at Camp Otsu for each session of the court. Time required for overall trial was fifty weeks, a total of twenty-two sessions."

Second, is the right to be free from double jeopardy. Petitioners Germait and Makarenko are being held for a continued trial (called "Appeal") scheduled for April 10, 1956 (see Affidavit of Edward J. Taylor, Exhibit B, Joint Appendix, 23, 26). Japanese law is based on the civil code and therefore a trial is not ended until the last appeal is determined. (See letter dated February 14, 1956, from the Office of the Judge Advocate General, Department of the Navy addressed to Representative Elizabeth Kee, J. A. 10.) Therefore, unlike our laws, both under the Constitution and under the Military Code, an appeal may be taken by the prosecution which is in fact a new trial and a new sentence. The letter states (first page, third paragraph) "Upon appeal, the facts as found by the court of first instance are generally binding, but the appellate court may reopen the facts *when necessary or consider new evidence.*"

These petitioners therefore are detained for the purpose of a new trial under Japanese law. They are thereby being subjected to double jeopardy in violation of our laws.

4.

A justiciable controversy is presented. Since this case involves extradition to a foreign power for trial and since the authority for and the validity of such extradition is challenged, a case presented within cognizance of the judiciary. A similar situation arose in *Tucker v. Alexandroff*, 183 U. S. 424.

5.

The District Court had jurisdiction. Both the District Court and the Court of Appeals have upheld the jurisdic-

tion of the court, although challenged by respondents. The respondents attacked the jurisdiction in two respects: First, that habeas corpus may issue only in a District Court where the prisoner is physically lodged; secondly, that habeas corpus may issue only if a person is detained, but that petitioners are not detained.

The first objection is founded on *Ahrens v. Clark*, 335 U. S. 188. But in that case this Court expressly reserved (at page 192, note 4) disposition of the question concerning the issuance of the writ when the prisoner is detained where no District Court functions or has jurisdiction. In *Burns v. Wilson*, 346 U. S. 137, where servicemen were involved this Court accepted jurisdiction in a case relating to servicemen in Guam. In *Toth v. Quarles*, 100 Lawyer's Ed. 4, this court accepted jurisdiction over a serviceman confined in Korea, though the writ issued against the Secretary of the Air Forces. In *Eisentrager v. Forrestal*, 84 U. S. App. D. C. 396, the jurisdiction of the District Court for the District of Columbia was sustained, and after this court reversed that case on different grounds, the Court of Appeals again in *Rubenstein v. Wilson*, 94 U. S. App. D. C. 152, sustained jurisdiction.

Jurisdiction must be sustained because the Constitution, Art. I, Sect. 9, provides for the writ, and is self-executing. This centuries-old remedy cannot be taken away because any statute may operate or have the effect of destroying the right. Nor can the failure of Congress to specify the extent of the reach of the writ operate to nullify this writ to a citizen who is compelled by governmental fiat to enter a foreign country, beyond the reach of a District Court.

It would come as a poor advertisment and shock to a recruit to learn that this ancient writ, available to the pettiest offender and to the most vicious criminal, is not

available to him because he happens to be in a foreign country, where he has not gone of his own choice. It cannot be lightly overlooked that this objection by the government comes with poor grace. This is the same government—though a different arm—that has sent these petitioners outside the territorial jurisdiction of our courts.

Secondly, these petitioners are detained. In their petition (paragraph "Second") the petitioners allege that they are detained and confined. This allegation alone is sufficient to support their application for a writ and to obtain a hearing on the facts, *Walker v. Johnston*, 312 U. S. 275; *Hawk v. Olson*, 326 U. S. 271, 273; *Williams v. Kaiser*, 323 U. S. 471, 473, both of the latter hold that allegations in a petition for a writ of habeas corpus are deemed true. It should be remembered that so far no writ was issued and that the judgment appealed from rests on an application why the writ should not be issued. *Ex Parte Quirin*, 317 U. S. 1.

The District Court upheld petitioners on this point. The government originally submitted to the District Court, an order which incorporated a finding of no detention, but the judge struck out that finding and held for the jurisdiction.

The Court of Appeals also upheld this point. Its opinion holds that since the petitioners are detained in Japan and are under military supervision in their movements, there is sufficient proof of detention.

But petitioners have gone further, they have shown in affidavits from their commanding officers that Germait and Makarenko are enlisted men whose terms have expired November 27, 1955, the latest, and that they are being detained for trial by Japan. They are thus restrained of their liberty. *Tarble's* Case, 80 U. S. 397;

Gibson v. United States, 329 U. S. 338, 359. Cozart is being detained to await trial by the Japanese (J. A. 8, 9).

On the argument, appellees sought to justify the conceded retention beyond the expiry of the enlistment on the ground that Marine regulations provided for such retention when charges are filed against personnel. However, such regulation refers to charges that are brought by the Marines under the Military Code. It was not intended to refer to charges brought by a foreign government. Source for such authority is to be found in a treaty, if such exists. Petitioners submit that they have raised substantial and important questions that should be reviewed by this court and that their petition should be granted.

Respectfully submitted,

FRANK SCOLINOS,
Palace Building,
Tokyo, Japan.

EMANUEL REDFIELD,
Counsel for Petitioners,
60 Wall Street,
New York, N. Y.

MURRAY SPRUNG,
Hotel Tokyo Building,
Tokyo, Japan,

Attorneys for Petitioners.

APPENDIX A.

Opinion, Court of Appeals.

Before EDGERTON, Chief Judge, and WILBUR K. MILLER and DANAHER, Circuit Judges.

EDGERTON, Chief Judge: This is an appeal from a judgment dismissing a petition for a writ of habeas corpus and discharging a rule to show cause why the writ should not issue.

Petitioners are citizens of the United States and members of the armed services stationed in Japan. Petitioner Cozart is awaiting trial by a Japanese court for causing a death by negligent operation of an automobile. His enlistment has not expired, but he would normally have been rotated to the United States in January, 1956. The other petitioners have been convicted, by a Japanese court, of rape, but are to be retried by a Japanese court, as Japanese law permits, because the prosecution is dissatisfied with the suspended sentences of two and three years that were imposed. The convicted petitioners are being kept in the Marine Corps, and in Japan, after their enlistments expired. All the petitioners are on active duty.

We agree with the District Court that it had jurisdiction of the petition for habeas corpus. We decided in *Eisentrager v. Forrestal*, 84 U. S. App. D. C. 396, 174 F. 2d 961 (1949), that persons held by the United States Army in Germany could maintain habeas corpus proceedings in the District of Columbia. In that respect the *Eisentrager* case has not been overruled. The Supreme Court reversed our judgment, but on other grounds. *Johnson v. Eisentrager*, 339 U. S. 763 (1950). We afterwards assumed the presence of jurisdiction, in accordance with the Eisentrager principle, in *Rubenstein v. Wilson*,

94 U. S. App. D. C. 152, 212 F. 2d 631 (1954). Since the petitioners are not at liberty to leave Japan, or to move about freely within Japan, they are sufficiently restrained for the purpose of habeas corpus. *Lynch v. Hershey*, 93 U. S. App. D. C. 177, 208 F. 2d 523, is not to the contrary. That case involved a selective service registrant who had been ordered to report for induction but was not, as the present petitioners are, under actual military control.

In *Kinsella v. Krueger*, U. S. , decided June 11, 1956, the Supreme Court said, citing *Schooner Exchange v. McFaddon*, 7 Cranch 116, 136: "* * *under the principles of international law each nation has jurisdiction of the offenses committed within its own territory." Dicta in the *Schooner Exchange* case and other early cases suggested that these principles do not apply to members of our armed forces abroad, but these dicta are now entitled to no weight because they cannot be reconciled with the Court's opinion in the *Krueger* case. In *Krueger* the Court sustained a murder conviction by an American court-martial in Japan, but did so on the ground that Japan, at the time of the offense, had ceded to the United States jurisdiction of such offenses. Since Japan has not, either at the time of the offenses with which the present petitioners are charged or at any later time, ceded to the United States jurisdiction of these offenses, Japan has jurisdiction to try the petitioners and might hold them in jail pending trial. They do not and cannot complain because they are not so strictly confined. The petition for the writ of habeas corpus was rightly dismissed.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 300

RIECE COZART, ET AL., PETITIONERS

v.

CHARLES E. WILSON, SECRETARY OF DEFENSE, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM SUGGESTING THAT THE CAUSE IS MOOT

This proceeding involves a petition for writs of habeas corpus by members of the armed forces of the United States, then stationed in Japan, challenging the right of military authorities to hold them in detention for trial by Japanese courts (see Pet. App. 19). The causes have become moot for the reason that none of the petitioners is now in the detention to which the challenge was directed.

We are informed by the Department of Defense that petitioner Cozart was on July 25, 1956, convicted by a Japanese court of negligence in the operation of an automobile and was fined a sum totalling $83.33. He did not appeal but paid the fine on

398925—56

August 14, 1956. On August 31, 1956, he was transferred from Japan to the United States for reassignment.

Petitioners Makarenko and Germait were, at the time the petition for habeas corpus was filed, awaiting possible retrial for rape. We are informed that the prosecution's motion for a retrial was denied, and that both petitioners have been discharged from service, Germait on July 18, 1956, and Mararenko on August 14, 1956.

Since, therefore, petitioners are no longer in the custody complained of in the petition for habeas corpus, the cause has become moot. See *McNally* v. *Hill*, 293 U. S. 131, 136–138.[1]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1956.

---

[1] In analogous circumstances, this Court has granted the petition for certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the District Court with directions to dismiss the proceeding. *McKay* v. *Clackamas County, Oregon*, 349 U. S. 909. See *United States* v. *Munsingwear*, 340 U. S. 36, 39, and cases cited.

U. S. GOVERNMENT PRINTING OFFICE, 1956